FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

Office Supreme Court U. S.
FILED
JAN 6 1904
JAMES H. McKENNEY,
Clerk

ALVIN L. LEIGH,
Plaintiff in Error,

vs.

HENRY S. GREEN,
Defendant in Error.

No. 119

BRIEF FOR DEFENDANT IN ERROR.

ED. P. SMITH, and
W. R. GREEN,
Attorneys for Defendant in Error, and of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ALVIN L. LEIGH,
Plaintiff in Error,

vs.

HENRY S. GREEN,
Defendant in Error.

No. 119

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Counsel for plaintiff in error states the issues in this case and the facts giving rise thereto, with substantial correctness, except that it is said that the petition of the plaintiff was in fact an action to redeem. The plaintiff did, in fact, in his petition offer to pay all legal taxes against the lands in controversy. The taxes, however, were a small amount. The defendant had bid in the land for its appraised value at the foreclosure sale for the aggregate sum of several thousand

dollars. The plaintiff did not offer to pay the amount required to redeem from these sales, nor indeed to pay defendant anything, for the taxes would have been payable to the state authorities.

An examination of the plaintiff's petition will show that the action was a collateral attack upon the foreclosure proceedings, based on the allegation of lack of jurisdiction in the *nisi prius* court.

I.

Before considering the case on its merits, the attention of the court ought to be called to the fact that the question now before it was not raised or determined until the second application for a rehearing in the Supreme court of Nebraska. The pleadings in the case contained no reference to the claim now made, that the statute in question was invalid and did not afford due process of law. It was not even raised in argument when the cause was first submitted to the Supreme court of Nebraska, except by an incidental reference thereto. The original opinion of the Nebraska Supreme court did not refer to the question of the constitutionality of the statute, and it therefore seems to us that the plaintiff in error is not now entitled to have the writ of error considered upon its merits, but that the same ought to be dismissed.

II.

Coming now to a question of whether the proceedings under the Nebraska statute were such as granted to the plaintiff "due process of law," we think it will be easy to demonstrate the correctness of the rulings of the lower court. While the procedure is somewhat rare, there was nothing novel therein, for it is as old as this

court and has been affirmed over and over again in the state courts. It was not a summary proceeding except that there was no trial by jury. There was notice to every one that had an interest in the land, a trial upon evidence heard, and an opportunity for every one to come into court and present his claim to the lands and resist the claims of the plaintiff in the foreclosure suits.

The statute in effect provided for proceedings *in rem* by directing that the action might be brought against the land itself, and the provision that the deed should be an absolute bar as against all persons was but a declaration of the familiar principle that judgments *in rem* are valid against all the world, whether made parties or not, if only the court has jurisdiction of the *res*.

It is, as we shall show, almost elementary that in actions *in rem* a party may be divested of his interest in lands, though not specifically made a party to such proceeding, and that in such cases he is held to have had his day in court and to have had the benefit of "due process of law."

We shall take up the contentions of counsel for plaintiff in error in what we deem their logical order, and will say at the outset that it is a matter of surprise that there should be any claim that the proceedings to enforce the tax liens were not actions *in rem*, for we had supposed that this matter was beyond the pale of discussion or argument.

On page 71 of the Transcript will be found the petition in one of the foreclosure cases, entitled Farmers' Loan & Trust Co., plaintiff, vs. Henry A. Root, and the northeast quarter of section 27, township 31, range 3

west of the 6th p. m., defendants. It may be said in this connection that all of the petitions are in the same general form, as well as all of the notices of suit.

It will be observed that the action is strictly *in rem*. In the first instance it was so treated by opposing counsel, and it is difficult now to understand how it can otherwise be claimed. The action was against the *res*, which was made defendant. It could by no possibility become one *in personam*, and being for the condemnation of the real estate was strictly *in rem*. Under all of the authorities it was *the land that owed the debt*, and it was now the land that must be condemned to the payment thereof. Mr. Cooley, in his work on Taxation, section 15, says: "A tax is not a debt due by the owner of the property."

In Blavins vs. Smith, 13 L. R. A. 441, the same rule is laid down, citing Blackwell on Tax Titles, sec. 954, and Jones vs. Devine, 8 Ohio St. 430.

> "A judgment for taxes, for the partition of property, or the foreclosure of a lien is *in rem*, if the proceeding is against the property or against all owners and claimants thereof, though generally such judgments are against designated persons, and in effect are restricted to their interests."
> Freeman on Judgments, sec. 607, page 1055.

Pritchard vs. Madren, 24 Kan., 349; Chancey vs. Wass, 35 Minn., 1, and Ball vs. Ridge Copper Co., 118 Mich., 7, are all parallel cases involving the foreclosure of tax liens, the only difference being that the plaintiff in these cases was not a private individual, but as we now understand, there is no claim that this would make

any difference. In each of these cases it was held that the action was strictly *in rem*.

Freeman vs. Anderson, 119 U. S. 185, cited by counsel, is not an authority for his position. On the contrary, the distinction made by Mr. Justice Field between actions *in rem* and actions *in personam* makes it clear that the tax proceedings involved herein were strictly *in rem*. The learned justice says, in delivering the opinion of the court:

> "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs."

Such was the case here, the land being, under the authorities, responsible for the claim of the plaintiff. The court goes on to say:

> "The property itself is in such actions the defendant, and its forfeiture or sale is sought * * * * * for debts or obligations for which by operation of law it is liable."

So in the case at bar the land was the defendant and its sale was sought for the tax obligation for which it was liable.

It is true that further on in the opinion actions for the enforcement of mortgages and other liens are spoken of as being only *quasi in rem*, but the mortgages and other liens referred to are obviously included in what is termed a large class of cases which the opinion says are brought against persons and only seek to subject certain property of those persons to the discharge of the claims asserted. In the same paragraph of the opinion the court says with reference to this class of actions.

> "They differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

It is clear, therefore, that the learned justice was speaking simply of such actions for the enforcement of mortgages and other liens as sought to reach only the interest of the defendant therein, and in which the property itself was not proceeded against.

If the construction claimed by counsel be put upon the statement in the opinion, then an action to enforce a lien against a vessel, which every one concedes is an admiralty proceeding strictly *in rem*, must be held to be only *quasi in rem*, which clearly the learned justice could not have intended to hold. The case, instead of being an authority in favor of the contention of plaintiff in error, is against it, and shows clearly that the action under consideration was strictly *in rem*.

In Woodruff vs. Taylor, 20 Vt., 65, it is said:

> "A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is in form, as well as substance, between the parties claiming the right, and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record, and those claiming by them. A judgment *in rem* is founded on a proceeding instituted not against the person as such, but against, or upon, the thing or subject

matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be." This definition clearly includes the case at bar.

There can be no contention over the doctrine laid down by the chief justice in the case of Tyler vs. The Judges, 55 N. E., 812. The legislature does not have the power to change an action for a personal claim to one *in rem*, and this is also true where only the interest of some particular person or persons is sought to be reached. It follows as a matter of course that the legislature cannot provide for anything except notice to the persons, in actions which are of this character and merely *in personam* or *quasi in rem*. This is all which is held in that case, and to this we agree.

III.

That plaintiff's grantor was not made a party to the foreclosure proceedings is entirely immaterial. The rule as laid down in Herman on Estoppel is as follows: (Section 296.)

"In many states, as to proceedings to foreclose tax claims, the proceedings are *in rem* against the land, and all persons are interested and bound by the judgment."

Citing Pritchard vs. Madren, 24 Kan., 349, in which the opinion was written by Justice Brewer of this court.

Mr. Wells, in his work on Res Adjudicata, page 507, quoting from Monroe vs. Douglas, 4 Sandf., Ch. 182, says:

"Of course specific parties are not necessary; where the subject matter of the suit is *res* is within the territorial dominion of the sovereign power under the authority of which the court acts, it is within the jurisdiction of such court. The persons or domicile of the parties proceeded against is not important in such cases in determining the question of jurisdiction. They would, on the other hand, be all important if the proceedings were purely *in personam*."

Judge Cooley, in his work on Taxation, page 672, with reference to proceedings for the enforcement of tax liens against land, says:

"Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands, or interest in lands, can they be. They are proceedings with regard to the land itself, rather than to the owners of the land, and if the owners of the land are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests and in order to make sure that an opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form."

The above language is cited with approval in Ball vs. Copper Ridge Co., 118 Mich., 7.

In his work on Constitutional Limitations, at page 498, the same learned author lays down the rule as follows:

"Cases are said to proceed *in rem* because they take notice of the thing in controversy, rather than of the parties concerned, and process is served upon that which is the object of the suit without specifically noticing the interested parties."

It will be observed, therefore, that it is not necessary that any person or persons should be named as parties to actions *in rem*, and indeed that it is one of the characteristics of an action *in rem* that it proceeds against the thing itself upon which notice is served and which is the only necessary party defendant in the action.

The citations from Mr. Cooley's work have an important bearing upon other matters in controversy in this case and will be hereafter referred to.

IV.

It is urged that the plaintiff's grantor had no opportunity or right to appear and defend in the foreclosure suits but this claim is contrary to all rules with reference to actions *in rem*.

In Mankin vs. Chandler, 2 Brock, 127, it was held that in a proceeding *in rem* the whole world are regarded as parties, and any person whomsoever having an interest in the property may interpose a claim or prosecute his appeal from the sentence.

In Freeman vs. Alderson, 119 U. S. 185, it is said:

> "The court acquires jurisdiction over the property in such cases (that is, cases *in rem*) by its seizure, and of the subsequent proceedings by public citation to the world, *of which the owner is at liberty to avail himself by appearing as a claimant in the case*."

Seizure, however, is not necessary where the property is land within the jurisdiction of the court.

Chancey vs Wass, 35 Minn., 1.
Tyler vs. The Judges, 55 N. E., 812.
Hamilton vs. Brown, 161 U. S., 256.

And it very definitely appears from these citations that the owner can always appear as claimant, if he desires.

In the Kentucky Tax Cases, 115 U. S., 321, it was held that where there was no provision of the statute any one interested might be permitted to interpose a defense.

The rule that any claimant may appear is a necessary corollary of the rule that no specific parties are necessary. No court has, or of course ever would, hold that a person who had a defense could be precluded from presenting it and then held to be barred by the judgment.

It will thus be seen that the plaintiff's grantor could, if he so desired, have appeared in the foreclosure proceedings and set up any claim that he might have had against the validity of the tax lien.

V.

If no personal defendants are necessary, it follows as a matter of course that it is not necessary to give any notice in actions strictly *in rem* to defendants by personal citation. It was at one time contended that no notice whatever was necessary in actions *in rem*, where seizure was made of the property. The rule now established by the weight of authority is, that notice is necessary, but that within reasonable limits the legislature may prescribe the nature of such notice, and that when notice is given in conformity with the legislative provisions, it affords everyone interested in the property due process of law.

In Monroe vs. Douglas, 4 Sandf., Ch. 182, it is said:

"Having jurisdiction of the subject matter *in rem*, the local regulations and laws of the country in which the court proceeds must determine what process or what form of notice shall suffice."

In Woodruff vs. Taylor, 20 Vt., 73, it was said that the notice required "is such as the law presumes will be most likely to reach the person interested."

In The Matter of the Empire State Bank, 18 N. Y., 199 (215), it is said:

"Where the legislature has prescribed the kind of notice, by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity afforded him to defend, I am of the opinion that the courts have not the power to pronounce the proceeding illegal."

This decision was reaffirmed in Happy vs. Mosher, 48 N. Y., 313. In Campbell vs. Evans, 45 N. Y., 356 (359), a case where live stock was distrained, it was said:

"In analogy to proceedings in other cases *in rem*, or for enforcing specific liens upon or forfeiture of property, the legislature has provided for notice, in such form and for such length of time as they thought reasonable and best calculated to inform the owner of the proceedings, and give him an opportunity to be heard."

And further on in the same opinion it was held that

"It was peculiarly within the province of the legislature to prescribe the notice and direct the manner of service."

The court therefore held the proceedings constitutional.

To the same effect is Hogle vs. Mott, 62 Vt., 255.

In 50 L. R. A., pages 599-600, is found an elaborate brief of the authorities bearing on the question of what process is necessary to give jurisdiction in actions *in rem*, the learned author showing that the authorities hold that within reasonable bounds it is for the legislature to determine this question.

Whatever may have been the provisions of the Nebraska statute in controversy, it is only necessary in actions strictly *in rem* to serve notice on the *res*, and when notice is so served it is notice to the world. It is so held in Cross vs. Armstrong, 44 Ohio St., 624.

In Branch Bank vs. Hodges, 12 Ala., 118, it was held with reference to actions *in rem*, that

> "Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where the proceedings are against the person, notice is served personally, or by publication; where they are *in rem* it is served upon the thing itself. A notice served on a thing, will give information to all who have any interest in it; every such person may therefore be considered a party."

It will be remembered that we have already cited from Cooley on Const. Lim, the statement that "process is served upon that which is the object of the suit without specifically noticing the interested parties" in actions strictly *in rem*.

Mr. Freeman, in his work on Judgments, Sections 606-607, lays down the rule as follows:

> "Laws exist under which property is responsible for taxes imposed upon it. These same laws often authorize the obligation by them imposed upon the property to be enforced by proceedings in which no service of process is required *except upon such property*. The judgment resulting from such a procedure is *in rem*, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon the property, and, in so acting, necessarily affects all claimants thereto."

The learned author also says on the following page:

> "Such a judgment, whenever binding upon any person is equally binding upon all persons."

In following that of the statute provided as it unquestionably did, for service upon the *res*, it provided for all that is necessary in actions *in rem*, regardless of whether it provided for notice to "all persons interested in said real estate."

But while process may be served upon the *res* and thus all interested parties notified, even this is not necessary, for no particular form of notice is required in actions *in rem;* and we shall show that the authorities uniformly hold that it is not necessary that the notice should be directed to any person or persons, or even to all persons interested in the property, but only that it should be of such nature as to apprise parties who read the same that their interests would be affected.

It follows that if the statute provided, as it unquestionably did, for service upon the *res*, it provided for all

that is necessary in actions *in rem*, regardless of whether it provided for notice upon "all persons interested in said real estate."

In Ball vs. Ridge Copper Co., *supra*, 118 Mich., 7, it appears that under the Michigan statute the auditor general may file in the Circuit court in chancery a petition for the sale of lands delinquent for taxes, and that thereupon the court shall make an order fixing a day for hearing. The statute further provides:

> "The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition of the filing thereof, of all proceedings thereon, and of the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition."

The defendant, which was a resident corporation, whose land had been sold, contended that this provision did not afford it due process of law. It will be observed that there was no provision for a notice directed to any one, but there was simply published information of the filing of the petition and the order for its hearing. The court said:

> "The statute makes the publication the equivalent of personal service, and it is therefore the duty of the owner to watch the proceedings provided for by the statute for the foreclosure of the lien, and interpose any objection he may have to the validity of the tax. The purpose of the statute is to give every person his day in court, in an equitable proceeding."

The court quotes from Judge Cooley the provision from his work on Taxation heretofore cited, to the effect

that proceedings of this nature are not usually proceedings against parties but have regard to the land itself, rather than the owners thereof, and after elaborate discussion of the authorities concludes with the holding that the Michigan statute afforded the complaining party due process of law.

Following the holding in the above case we urge that it was the duty of all parties interested in the land in controversy to "watch for the proceedings provided for by the statute for the foreclosure of the lien, and interpose any objection they might have to the validity of the tax."

On page 78 of the Transcript will be found one of the notices under consideration. No one reading this notice could fail to understand the nature of the proceeding, and it was his duty equally in Nebraska as in Michigan to know the law; he must be held to have known that this proceeding cut off any interest that he might have in the real estate described therein, and he must, equally with the complainant in Michigan, have been afforded due process of law.

In Francis vs. Grote, 14 Mo. App., 324, it appeared that the statute provided for publication of the delinquent list of taxes, which was to be a notice of application to the county for a judgment and sale by the order of court, and that the assessment and advertisement should impart notice to the owner. No provision was made for any further notice, but the county court could then proceed to judgment and order for sale. The party complaining of the proceedings was a resident of the county, and he claimed that the proceedings were unconstitutional by reason of his having received no

notice, and that he had not had his day in court. But the court said:

> "There is nothing in the objection. It has never been held that any revenue law was unconstitutional on the ground that it made no provision for personal service on the owner of the land sold for taxes."

The court added that similiar statutes had been held constitutional in Tennessee, Ohio, Indiana and Illinois.

It will be observed that in this class of cases as exemplified by the two last cited, no notice is given to any one as defendants nor is the publication specially directed to any party. On the other hand the publication simply states the nature of the proceedings sought to be carried on, so that any person who reads may be aware thereof, and this is all that is necessary.

It should be noted in this connection that while the notice must be a reasonable one, what would be reasonable in a tax case might not be reasonable in some other. But every one knows that his property will be sold for taxes, if the taxes are not paid, and the parties interested in the land in controversy were presumed to know the law, and that the sale under the provisions of the statute would be an absolute bar against them.

Davidson vs. New Orleans, 96 U. S. 97, while cited by counsel, is strongly against the position taken by plaintiff in error. Mr. Justice Bradley, in his opinion therein, says:

> "That in judging what is 'due process of law', respect must be had to the cause and object of the taking, whether under the taxing power, the

power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.' "

The proceedings in this case are strictly in accordance with that portion of the opinion of Justice Miller in the same case quoted by counsel. The law provided "for a mode of confirming or testing the charge in the ordinary courts of justice, with such notice to the person or proceeding in regard to the property as is appropriate to the nature of the case," and therefore, in the nature of things, "the proceedings did not deprive the owner of his property without due process of law."

We cannot conceive of any notice more appropriate to an action for the condemnation of land to the payment of taxes than the one which was published in this case. It is directed to the land itself, and therefore shows that no personal claim was sought. It describes fully the nature of the action and gives full warning of the proceedings to be taken.

VI.

It is claimed by counsel that plaintiff's grantor was a resident of the state, and it seems to be contended for that reason that he could not be served with notice by publication.

The record does not disclose the residence of Patrick, and if it were necessary to the jurisdiction of the court, the presumption would be that he was a non-resident. But however the fact may be, it is immaterial in this case.

In the cases heretofore cited of Pritchard vs. Madren, 24 Kan., 349; Chancey vs. Wass, 35 Minn., 1, and

Ball vs. Ridge Copper Co., 118 Mich., 7, it appeared that the objecting parties were residents, who received no notice other than the general notice by publication, not being named as defendants.

In Campbell vs. Evans, 45 N. Y., 256, also heretofore cited, it was said that in such cases it was immaterial whether the parties interested were residents or whether the owner was known.

In Hamilton vs. Brown, 161 U. S., 256, it was held that in actions *in rem* notice might be served by publication upon residents.

In Shepard vs. Ware, 48 N. W. R., 773, (46 Minn., 184), the same holding was made after a full discussion of the authorities.

In all of these cases the principal contention was that "due process of law" was not afforded by such service, but in each case the contrary was held.

To sum up this branch of the case, we insist that the notice was sufficient (1) because it was served upon the *res*, (2) because it was appropriate to the suit and reasonable and in accordance with the provisons of the statute, and (3) because it was entirely immaterial whether plaintiff's grantor, Patrick, was a resident or non-resident or named in the notice.

The rule is not that a defendant may be bound without notice even in an action *in rem*, but that a general notice is sufficient without naming him and he is held bound thereby.

VII.

Passing to the consideration of the provisions of the statute for notice, we contend that it has been miscon-

strued by counsel, although such misconstruction is immaterial under the authorities we have cited. Counsel argues that there is no provision for service upon anyone but the owner of the property. The language of the statute is:

> "Where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a non-resident."

The contention that provision is only made for service upon the owner seems strange, especially in view of the fact that the provision only applies where the owner is unknown. If the owner is unknown, how can service be made upon him by publication or otherwise, except by a general notice? He cannot be named, for his name is not known. It is not intended that he should be a defendant for the same reason, and for the further reason that the action is against the land itself. The provision that "the service must be as in the case of a non-resident," is not limited to any particular person or persons or to the unknown owner. It is a general provision and must mean that whatever service is necessary and proper in the case must be made by publication. If the true rule is as we contend, that service is only necessary upon the thing, and that a notice in conformity with the provisions of the statute is sufficient, then it must be held that the notice in controversy contained not only all but more than was necessary. If it should be held contrary to these authorities that notwithstanding the action was one *in rem* a notice to all parties interested was necessary, even then the notice is sufficient, for it contained that provision.

If counsel be correct in their contention, there was no provision even for service on the land, although by express provision of the statute the action was to be commenced against it, and notwithstanding the manifest intention of the legislature to create an action *in rem*.

Errors on the part of legislative assemblies are numerous, but statutes like the one under consideration are always prepared by lawyers, and no lawyer could be so foolish as to suppose that the rights of all persons whomsoever could be barred simply by service on the owner, or that an action could be brought against the land itself without serving notice upon it. But the statute does not say that service must be made upon the "owner." It simply says that service must be made by publication in such case, that is, a case where the owner is unknown and the action is commenced against the land itself. In short, the statute simply provides the manner of serving the process or notice, but is silent as to who shall be served and as to the form of the notice.

These matters are left to be determined by the general rules which apply to actions of this nature. Were the action one *in personam*, personal citation that is, a naming of the defendant or defendants would be necessary according to the quotations heretofore made from Freeman vs. Alderson, *supra*. The action, however, being *in rem*, and specific parties not necessary, notice might be given to "all parties interested in said real estate," as was done in the notice, without specifically naming the parties. This, we contend, was not necessary, but if it was necessary, it was provided for by the statute. The form of the notice might have been specified in the statute, but not being specified, the statute clearly contemplated that such notice as was necessary

would be given, and provided the manner in which it might be served.

The provision for the foreclosure of a tax lien is extremely liberal in comparison with the ordinary summary process of collecting taxes. In most of the states, and in Iowa for example, a general notice is published describing the property which is delinquent and the amount of taxes against it, and reciting that sale will be made thereof at a certain date. The owner or person interested in the lands has no opportunity of resisting the sale other than by paying the claim against the land. There is no opportunity given for a hearing and no way in which one could be had. If a party interested desires to contest the proceeding, he can do so only in a proceeding instituted by himself, in which nearly every presumption is against him. Under the liberal provisions of the Nebraska statute in question there was notice of the hearing, and an opportunity to be heard, with the fullest opportunity for any person interested in the land in question to contest the charge made against it. If it should now be held that because the state has seen fit, instead of resorting to a summary proceeding; to give this opportunity to the owner, that the state must give personal notice to all persons interested in the land, then it is obvious that it must fall back upon the usual summary proceeding, to the great injury of all persons who in good faith desire to contest the charges made against their lands.

It would be strange indeed if the court should hold that the more summary the process the easier to dispense with notice; and the more liberal the proceeding the greater the strictness with which the state must be controlled. Public policy requires that the state should

have its taxes, and the laws should not be so construed as to enable their evasion. On the other hand the state should not be required, by over technical construction of the rule of service, to resort to methods which unduly harass the citizen without any benefit to itself.

"Due process of law" in tax proceeding must necessarily depend largely upon what has been the practice from the earliest times. For this reason very summary proceedings have been sustained, because such has always been the practice. If summary proceedings can be sustained as providing "due process of law," with how much more reason can a court sustain a proceeding like the one under consideration?

In Chauncey vs. Wass, 35 Minn., 1, heretofore cited, a case for the foreclosure of a tax lien, we find quoted with approval the following from De Treville vs. Smalls, 98 U. S., 525:

> "We are not unmindful of the numerous decisions of state courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. * * * * There is no possible excuse for not enforcing such statutes according to their letter and spirit."

It is unnecessary to say that where a statute can be construed in such a manner as to make it conform to the constitution, that construction ought to be given it. The Nebraska Supreme court has passed upon the form of notice in this case and has held that it conformed to

the provisions of the statute, and its construction is entitled to be followed by this court. It has twice, in the cases of Carmen vs. Harris, 61 Neb., 40, and Grant vs. Bartholomew, 57 Neb., 673, held that the action is one *in rem*.

In these cases special stress was laid upon the fact that no claim could be made against any person for the taxes under consideration, and it was held in the last named case that real estate taxes were a charge against the real estate only, and not a debt or obligation of the owner.

After a full hearing and rehearing nine members of the court of that state have pronounced the proceedings constitutional, and held that they afforded the plaintiff in error due process of law.

We insist that under the authorities his grantor was properly served with notice, has had his day in court and opportunity to defend, and that plaintiff's writ of error ought to be dismissed.

ED. P. SMITH and
W. R. GREEN,
Attorneys for defendant in error and of counsel.

1108

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 6 1904
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1903.

ALVIN L. LEIGH,
Plaintiff in Error,

vs.

HENRY S. GREEN,
Defendant in Error.

No. 119.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

ED. P. SMITH, and
W. R. GREEN,
Attorneys for Defendant in Error, and of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1903.

ALVIN L. LEIGH,
Plaintiff in Error,

vs.

HENRY S. GREEN,
Defendant in Error.

No. 119.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The extremely short time given by the rules made it necessary to prepare the former brief in the space of a day, and the following supplemental brief is submitted in support of the position of the defendant in error, that due process of law in the collection of taxes does not require the ordinary procedure, even though resort is had to the courts to enforce or establish the lien of the tax and a sale thereunder. Upon this point we merely cite the leading authorities.

The constitutional requirement of due process of law relates to the remedy or means used and not to substantive law, and the complainants property is not taken from him without due process of law if he is allowed a hearing at any time before the lieu of the assessment becomes force.

Board vs. Collins, 46 Nebr., 627

C. B. & Q. vs. State, 47 Nebr., 549.

It is sufficient if a notice is given which will enable the property owner to obtain a hearing before some tribunal and contest the validity and fairness of the taxes assessed against him.

Gillmore vs. Hentig, 33 Kan., 405.

Board vs. Collins, 46 Nebr., 427.

The notice is to be considered in connection with the provisions of the statute which the tax payer is bound to know.

Lent vs. Tillson, 72 Cal., 404.

(Affirmed 140 U. S. 316.)

Kas. City vs. Duncan, 135 Mo., 571.

Davis vs. City, 86 Cal., 37.

Ball vs. Ridge Copper Co., 118 Mich., 7.

The constitution should be read into the statute with relation to notice.

Lent vs. Tillson, 14 Pac., 71.

Ky., Tax cases 115 U. S. 316.

Paulsen vs. City of Portland, 149 U. S. 30.

Gilmore vs. Hentig, 33 Kas., 405.

It is not necessary to adopt the same procedure collecting taxes through the courts as in a strictly judicial proceeding.

City of Duluth vs. Dibble, 62 Minn., 18.

King vs. Mullen, 171 U. S. 404.

Murray vs. Hoboken Land Co., 18 How., 272.

ED. P. SMITH, and
W. R. GREEN,
Attorneys for Defendant in Error, and of Counsel.